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NO. 854

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

GEORGE FUQUA — Appellant

vs.

THE STATE OF MISSISSIPPI — Appellee

Appeal from The Supreme Court of the State of Mississippi

STATEMENT AS TO JURISDICTION

E. H. CUNNINGHAM, JR.
and
NOEL W. BUCKLEY
Counsel for Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO._____

GEORGE FUQUA — Appellant

vs.

THE STATE OF MISSISSIPPI — Appellee

STATEMENT AS TO JURISDICTION, BRIEF, AND OTHER MATTERS REQUIRED BY RULES 13 AND 15

In compliance with Rules 13 and 15, Petitioner files his Statement of Jurisdiction and other matters required.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked under Title 28, U. S. C., Sec. 1257 (3).

FEDERAL QUESTIONS SOUGHT TO BE REVIEWED

Appellant Fuqua was denied his Constitutional rights and guaranties against unreasonable search and seizure of his automobile and the introduction in evidence of certain articles found therein and in the Trial Court admitting into evidence proof and inferences of other crimes wholly disconnected and separate from the crime with which he was indicted by the judgment and sentence

of the Circuit Court of Harrison County, Mississippi, in permitting in evidence over objection of Appellant certain objects and articles found in the automobile of the Appellant, over his timely objections as such evidence was the result of an unlawful arrest and illegal search and not incidental to an arrest within the purview of the laws of this State thereto appertaining and without a search warrant, and in permitting in evidence over the objection of Appellant proof and inferences of numerous other crimes which were unrelated and independent crimes, some of which had occurred in other states, and which could have no effect upon the Trial of the Defendant except to inflame the jury to the extent that he would be denied due process and equal protection of the laws. The conviction by the Trial Court based upon such illegal evidence and the sentencing of Appellant to serve a term of three years in the Mississippi State Penitentiary; that thereby, the Trial Court, and by its affirmance, the Supreme Court of Mississippi, has denied the Petitioner his constitutional guaranties against an unlawful arrest; unreasonable search and seizure and further has contravened his rights under the due process clause of the Constitution of the United States:

Article III, Bill of Rights, Sections 26 and 23, Constitution of Mississippi.

XIV Amendment to the Constitution of the United States.

The IV, V, and VI Amendments to the Constitution of the United States.

Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.

TIMELINESS OF APPEAL

The opinion of the Supreme Court of Mississippi affirming the conviction, is reported in "Fuqua v. State, Miss. , 145 So. 2d. 152;" decided October 8th, 1962, a copy of said Opinion is contained herein and marked appendix "A". The notice of appeal was filed with the Supreme Court of Mississippi within the ninety days as required by the Rules of this Court, thereafter a Justice of the Supreme Court of Mississippi, on the 7th day of January, 1963, prior to the expiration of the time for docketing said appeal entered an order allowing an enlargement of the time for 45 days within which to docket this appeal in the Supreme Court of the United States.

STATEMENT OF THE NATURE OF THIS CASE AND RULINGS OF COURTS BRINGING THIS CASE WITHIN JURISDICTIONAL PROVISIONS ON WHICH RELIANCE IS MADE

The questions presented by this appeal are: 1. Right of a citizen of the United States to security against unreasonable searches and seizures. 2. The right of a citizen to a fair and impartial trial, and due process of the law.

The Constitutional questions involved herein were first raised in the Trial Court during the trial, in the motion for a new trial, and in the Supreme Court of the State of Mississippi in the Brief of Appellant.

Petitioner was joinly indicted with James Dolan and Betty Johnson for possession of burglar's tools and separately tried. Appellant was convicted and sentenced to the penitentiary for a period of 3 years.

The Statute under which the appellant was indicted was Sec. 2044 of the Mississippi Code of 1942, as amended, which provides that if a person who has in his possession "implements, tools or instruments *designed* to aid in the commission of burglary, larceny or robbery;" it shall be unlawful; however, before it can be presumed that such implements, tools or instruments are to be used for such purpose, they must be "peculiarly adapted" to such purpose. The indictment did not charge that any of the tools or instruments were adapted or designed for robbery.

The conviction of the petitioner rested on the introduction into evidence of certain tools and articles taken from the automobile of appellant, all of which were ordinary mechanics tools and household items which may be found in the possession of most garages, mechanics and homes, and which may be found for sale at practically all hardware, variety and drug stores, with the exception of the .38 caliber pistols which are not recognized by any authorities as tools adopted and designed to aid in the commission of burglary or larceny, and certainly these articles were not peculiarly adapted to aid in the commission of burglary or larceny, and appellant was not charged with the possession of robbery tools. All of the common mechanic's tools and ordinary household goods were obtained as the result of an unlawful arrest and an illegal search of the automobile of appellant as shown by the testimony of the arresting officer, Jack Anderson, who testified that he did not have a warrant for the arrest of the appellant, nor had he seen one (R. 35). He testified that the defendant had violated no law in his presence on this occasion (R. 46); that he placed defendant under arrest as defendant was getting out of the car and told him to come back (R. 58-59). No one made any effort to

look into the automobile at that time, and it was not searched at that time (R. 47). The testimony shows that the car was driven by Betty Johnson five miles from the place of arrest to the Highway Patrol Office where it was searched about thirty minutes later (R. 47); that at the time of the search the defendant was in custody on the inside of the Patrol Station and that no one had a search warrant for the automobile.

The arresting officer did not comply with Section 2470, Mississippi Code of 1942, which sets forth the conditions under which arrests may be made, and which sets forth the prerequisites for a lawful arrest without a warrant, and states:

> "And in all cases of arrests without warrant, the person making such arrest *must* inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit."

If an accused person is not lawfully arrested before the search, no evidence of an alleged crime found by the search can be used against him, *Cryer v. State*, 14 So. 261, 71 Miss. 467. In order to constitute an arrest, the officer must inform the accused that he is under arrest and for what crime, *Shedd v. State*, 203 Miss. 544, 33 So. 2d 816.

The arrest of the appellant was clearly illegal and unlawful, and the objects found in the car the result of an illegal search and were not admissable in evidence.

The search of appellant's automobile was unreasonable and deprived him of his constitutional rights, and was not made as an incident of the arrest, assuming the arrest to have been legal, inasmuch as at the time of the search the appellant was in custody, much time had elapsed since

his arrest and there was no sound and valid reason to search his automobile, as there was no probable cause to believe that he had burglars tools or any other contraband in said automobile. The leading case in the State of Mississippi on this point is *Millette*, 167 Miss. 172, 148 So. 788, in which the Court cited as chief authority *Angello v. United States*, 26 U.S. 20, which held that a search of the nature of the search in the instant case was illegal.

It seems that, from the testimony in this case, the arrest of appellant was used solely as a pretext to search for evidence in the automobile of appellant. This cannot be done. *McKnight v. U. S.*, 87 U.S. App. D.C. 151, 183 F. F. 2d 977; *United States v. Chodac*, D.C., 68 F. Supp. 455.

Any search which is as an incident to an arrest is a limited search; it extends only to the immediate presence, the possessions in his immediate control and in his immediate surroundings: *Drayton v. U. S.*, 5 Cir., 205 F. 2d 35, 47. *Am. Jur., Search & Seizure*, Sec. 19, p. 515. The search of appellant's automobile was not in his immediate presence, the automobile was not in his immediate control, nor was the automobile in his immedite surroundings at the time of the search.

In the Trial of this cause the Court allowed proof and inferences of several other crimes wholly disconnected and separate from that alleged in the indictment, including two criminal offenses committed in the State of Louisiana.

Harry Bennett, a witness for the State, on direct examination, testified in detail how three men impersonating Federal officers came to his apartment in New Orleans around the first of December, 1960, and robbed him of several hundred dollars and a .38 caliber revolver. There

was no evidence that this defendant participated in that robbery. The testimony is that he did not see the defendant, Yet, this testimony was allowed to go before the jury as a part of the State's case against this defendant. This defendant, so far as the record shows, was not charged with the commission of the robbery. This testimony concerning the impersonation of Federal officers and robbery was irrelevant and immaterial and highly prejudicial to defendant.

The plain inference is that this defendant was in some way involved in the robbery but, nevertheless, the fact remains that there is no evidence to justify such inference. The Court's instruction in effect emphasizes that the pistol was stolen property, and the only conclusion to reach is that the defendant stole it during the robbery. The method of operation used during the robbery in New Orleans does not in any manner connect this defendant with the robbery. The proof is entirely lacking in this regard. The two unrelated and independent crimes perpetrated in the State of Louisiana which the Court permitted to go before the jury were not competent to prove the charge for which the defendant was then on trial. This testimony no doubht had a tendency to prejudice the jury against the defendant.

Our contention that this testimony was inadmissable and deprived the Appellant of his right to a fair and impartial trial and his Constitutional rights is supported by:

Mapp vs. Ohio, 367 U.S. 643, 6 L. ed 2d 1081, 81 S. Ct. 1684

Albritton vs. Winona, 181 Miss. 75, 178 So. 799

Scarbrough vs. State, 204 Miss. 487, 37 So. 2d 748

Hawkins vs. State, 224 Miss. 309, 80 So. 2d 1

Brooks vs. State, 209 Miss. 150, 46 So. 2d 94
Brown vs. State, 224 Miss. 498, 80 So. 2d 761
Cryer vs. State, 14 So. 261, 71 Miss. 467
Shedd vs. State, 203 Miss. 544, 33 So. 2d 816
Millette, 167 Miss. 172, 148 So. 788
Angelio vs. United States, 26 U.S. 20
McKnight vs. U. S., 87 U.S. App. D.C. 151, 183 F.F. 2d 977
United States vs. Chodac, D.C., 68 F. Supp. 455
Drayton vs. U. S., 5 Cir., 205 F. 2d 35, 47 Am. Jur. Search and Seizure, Sec. 19, P. 515

The search of the automobile of Appellant without a warrant, after an unlawful arrest and which was not an incident to the arrest, together with the testimony of witnesses concerning other crimes, which were prejudicial to the Appellant, were violative of Appellant's rights under Articles IV, V and VI of the Amendments to the Constitution of the United States and also of the due process clause of the Fourteenth Amendment to the Constitution of the United States as well as Sections 23 and 26 of the Constitution of the State of Mississippi.

GROUNDS SUSTAINING JURISDICTION AND DEMONSTRATING SUBSTANTIAL FEDERAL QUESTIONS

I.

That the affirmance of the sentence of the Trial Court imposed upon Appellant by the Supreme Court of Mississippi, amounted to a deprivation of the Appellant to be secure in his person, houses, papers and effects against unreasonable searches and seizures, in that his arrest was unlawful and the search of his automobile was without a warrant, without probable cause and was not incident to a lawful arrest.

II.

That in affirming the conviction of Appellant and condoning the introduction in evidence in the Trial Court proof of other crimes and inferences of other crimes, said Supreme Court denied Appellant his Constitutional guaranties under the Fourteenth Amendment to the Constitution of the United States.

III.

The Supreme Court of Mississippi should have held such search illegal and the evidence obtained by said search inadmissable in evidence and should have rules that the evidence concerning the separate and distinct crimes and inferences of crimes inadmissable and should have reversed the cause.

Article III, Bill of Rights, Sections 26 and 23, Constitution of Mississippi.

XIV Amendment to the Constitution of the United States.

Mapp vs. Ohio, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684.

Blackburn vs. Alabama, 361 U.S. 199, 4 L. ed. 2d 242, 80 S. Ct. 274.

Rogers vs. Richmond, 365 U.S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735.

Re: Middlebrook, D.C. Cal., 88 F. Supp., 943-53.

U. S. ex. rel. Montgomery vs. Ragen, D.C. Ill., 86 F. Supp., 382, 388, 391.

CONCLUSION

It is respectfully submitted that this Court should take jurisdiction of this cause because important and substantial Federal Jurisdictional questions were disposed of by the State Courts contrary to the rights of Appellant as herein set out and guaranteed him by the Constitution of the United States. Upon hearing there should be exercise of the supervisory powers of this Honorable Court upon the issues thus presented and determined.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 42,145

GEORGE FUQUA

v.

STATE OF MISSISSIPPI

GILLESPIE, JUSTICE:

Appellant was jointly indicted with James Dolan and Betty Johnson for possession of burglar's tools. Separately tried, appellant was convicted and sentenced to the penitentiary.

The facts are not in dispute. Highway Patrolman Anderson was in a patrol car traveling west on U. S. Highway 90 between Biloxi and Gulfport. Highway Patrolman Button was in another patrol car behind Anderson. Anderson was looking for appellant. Sometime before, Anderson had heard an official bulletin on the Highway Patrol radio at Gulfport that the Sheriff of Hinds County had a warrant for appellant's arrest on a perjury charge. Anderson had a photograph of appellant in his patrol car and had information that appellant was driving an automobile with a Georgia license tag. At the aforementioned time and place, Anderson saw appellant driving an automobile and radioed Patrolman Button to check the license tag. Button reported that it was a Georgia tag. About this time, appellant turned off the highway at the Friendship House Restaurant. Anderson turned onto a service road and immediately returned to the place where appellant parked at the Friendship House, arriving just as appellant and his two companions alighted from the car. Button also arrived about this time.

Anderson immediately arrested appellant. He did not then search appellant's car, but looked into the rear and saw some lights, a small bag, and some clothing.

After Anderson was satisfied that appellant was unarmed, they all drove to Highway Patrol headquarters, a distance of about five miles west of the Friendship House. Appellant rode with Anderson, Dolan with Button, and between them was appellant's car driven by Betty Johnson. A short time after they reached Patrol Headquarters, appellant's automobile was searched. To a leading question propounded by defense counsel, Anderson said it was "roughly" thirty minutes after arrival at Patrol Headquarters. The testimony would justify a finding that the car was searched less than thirty minutes after arrival at Patrol Headquarters. There is no proof whatever that the officers abandoned or interrupted their duties in connection with the arrest of appellant before searching the car. Appellant and the car were at Patrol Headquarters when the search of the car was made.

The automobile was claimed by Fuqua but was licensed to R. K. Head, with a Georgia address. In the car was a Louisiana certificate of title. When the automobile was searched, the various articles found were listed by Anderson and two others who assisted in making the inventory. The following articles were found in the car: 3 boxes of red tissue, 2 big spot lights, 1 tire tube, 1 box socket wrenches, 1 pair of black kid gloves, 1 large flash light, 1 box assorted keys (skeleton), 1 small pocket or keyhole flash light, 2 large magnets.

Also, between the front and back seats of the car, there was a large amount of clothing for men and women, a bag containing two loaded pistols, about 25 rounds of extra ammunition, a police sergeant's badge, and some

of the lights already mentioned. The skeleton keys were for various kinds of automobiles, juke boxes, pay telephones, and other kinds of locks. One key would unlock the door to the Highway Patrol Headquarters, and another unlocked one of the patrol cars.

Joe Simon, resident of Biloxi, testified that one of the pistols found in appellant's car was purchased by Simon about a year before and loaned to one Bennett. He identified the pistol by the serial number. Bennett testified that he borrowed this particular pistol from Simon and had it in an apartment in Jefferson Parish, Louisiana, a few weeks prior to the time appellant was arrested by Patrolman Anderson; and that two men, unknown to Bennett, impersonated officers by using a badge like the one found in appellant's car, and entered Bennett's apartment. He further testified that when the men got into his apartment they drew a gun on him, and this gun was identical in appearance to one of the guns found in appellant's car. Bennett said he and a companion were robbed of money and the identical pistol found in appellant's car by Patrolman Anderson. The two pistols and police badge were not described in the indictment. The proof showed that most of the articles found in the automobile were either designed to aid in the commission of burglary or larceny, or were articles commonly used by burglars.

Appellant offered no proof whatever.

Appellant assigns as error the action of the trial court in overruling the motion for a directed verdict. The argument under this assignment is directed to the sufficiency of the evidence. Appellant was indicted under Section 2044, Mississippi Code of 1942, which follows:

"It is unlawful for any person to have in his possession implements, tools, or instruments designed to aid in the

commission of burglary, larceny or robbery; and on the conviction of any person thereof, he shall be punished by imprisonment in the penitentiary not exceeding five (5) years, or in the county jail not exceeding one year. The carrying concealed about one's person, or in one's baggage, implements, tools, or instruments peculiarly adapted to aid in the commission of burglary, larceny or robbery, shall be prima facie evidence of intention to use them for such purpose."

Appellant contends that the articles found in the car were neither designed for nor peculiarly adapted to aid in the commission of a burglary. We hold the evidence sufficient to justify the jury in finding that appellant violated the statute. The 150 skeleton keys were peculiarly adopted to aid in the commission of burglary. This was established by the proof, and is a matter of common knowledge. It is not necessary that the tool or article be designed and made solely for use as a burglar's tool. It may be designed for a lawful use and still be a burglar's tool. The other items, such as lights, kid gloves and wrenches, were shown by the proof to be useful adjuncts to burglar's tools, and as such became burglar's tools since all of the circumstances shown by the evidence justified a finding that they were possessed for the unlawful purpose of committing the crimes named in the statute. The statute does not denounce as unlawful the possession of any particular instruments, tools, or instruments. The possession of a particular article, or combination of articles, may or may not be unlawful under the statute, depending on whether the evidence reveals circumstances from which it may be inferred beyond a reasonable doubt that the possessor intended that he or some other person use the article or articles in aid of burglary or other similar crime. The Mississippi statute does not

refer to a specific felonious intent, but a felonious intent must be proven. The State is not required to prove a specific intent to commit a particular crime; but it is sufficient if the circumstances justify the inference that the article or articles were possessed for such criminal purpose. Thus, a general intent is sufficient.

The cases from other jurisdictions reveal that the possession of skeleton keys has probably resulted in more convictions than any other article. Indeed, the unexplained possession of a large number of various types of skeleton keys is strong evidence that they were possessed for a felonious purpose. The presence in the automobile of the other items, especially the loaded pistols, extra ammunition, policeman's badge, keyhole flashlight, kid gloves, and spot lights, and the fact that there was a stolen pistol in the car, indicates that the combination of articles described in the indictment were possessed for unlawful purposes. The jury was fully justified in finding the evidence established appellant's guilt beyond a reasonable doubt. Anno., 103 A.L.R. 1313; 9 Am. Jur., Burglary, par. 89, page 283; Illinois v. Esposito, 163 N.E. 2d 48; Rinehart v. State (Fla.), 114 So. 2d 487; Cf. Head and Cummings v. State (Miss.), 136 So. 2d 619.

Appellant next assigns as error the action of the lower court in admitting in evidence the testimony of Bennett that he was robbed in Louisiana a few weeks before appellant was arrested in Mississippi in possession of a gun stolen from Bennett in said robbery.

It is a general rule that evidence that an accused committed another crime independent of, and unconnected with, the one for which he is being tried, is inadmissible. However, the court did not err in admitting the testimony of Bennett. One of the pistols found in appellant's car

had been recently stolen. The other pistol found in appellant's car and the police badge were identical to the pistol and badge used in the Louisiana robbery. These facts tended to establish that the articles described in the indictment were possessed for felonious purposes. Proof of the Louisiana robbery was therefore a link in the chain of circumstances which justified the jury in characterizing the articles found in appellant's car as burglar's tools. Therefore, the evidence of the Louisiana robbery was relevant as tending to establish his guilt of the crime of possession of burglar's tools. State v. Hefflin, 89 S.W. 2d 938 (Mo.), 103 A.L.R. 1301; 22 C.J.S., Criminal Law, Sec. 691(7); Wharton's Criminal Evidence, Vol. 1, page 498, et. seq.; Cf. Mattox v. State (Miss.), 137 So. 2d 920.

Appellant assigns as error the action of the lower court in admitting the two pistols in evidence. These pistols were not described in the indictment. The pistols were admissible for the reason already stated, and it was not necessary that they be described in the indictment.

The other two propositions raised by appellant are based on the contention that the search of appellant's car was unreasonable and illegal. This contention has two main points of inquiry: (1) Was the arrest legal? and (2) Was the search of the car incident to the arrest?

We hold that Patrolman Anderson had lawful authority to arrest appellant. The arresting officer had official information that appellant was wanted on a perjury charge and that the Sheriff of Hinds County had a warrant for his arrest of that charge. He also had in his patrol car a photograph of appellant and had made a study of it in order to be able to recognize appellant. Official information is presumed to be authentic. It was sufficient to constitute probable cause for the arrest of

appellant. Sec. 2470, Miss. Code of 1942. Law of Arrest, Alexander, Sec. 77; Silver v. State (Tex.), 8 S.W. 2d 144, 60 A.L.R. 290; Shay v. State, 229 Miss. 186, 90 So. 2d 209.

There is no merit to the contention that the arrest was illegal because the officer did not comply with the requirement of Code Section 2470 to the effect that the accused must be informed of the object and cause of his arrest.

We also hold that the search of appellant's car was incident to the arrest, and that the evidence found by the search was admissible. Appellant's argument is based on the officer's failue to make the search at the Friendship House immediately after the arrest. The Constitution only requires an officer to be reasonable. The record indicates that Patrolman Anderson had reasonable ground to believe that appellant was potentially dangerous and might make violent effort to escape. An officer should take reasonable precautions in such matters both for his own safety and to insure against the escape of the person arrested. There were two other people in appellant's car. Even with the help of Officer Button it would not have been feasible or safe to search the car on private property at the Friendship House. The items found had to be inventoried and tagged. It was proper, reasonable and sensible to do what the officers did in this instance—drive to Patrol Headquarters, turn the prisoners over to the proper person, and then search the car. There is nothing in the record to show that Officer Anderson lost any unnecessary time before making the search. No other duty or activity intervened between the arrest and the search. It is reasonable to infer that a few minutes times would necessarily elapse after the three automobiles reached patrol headquarters before the officers could make the search.

All of the circumstances must be taken into consideration, and it seems clear to us that there was no undue delay in making the search in this case. Our attention has been directed to the cases of Millette v. State, 167 Miss. 172, 148 So. 788; Lancaster v. State, 188 Miss. 374, 195 So. 320; Page v. State, 208 Miss. 347, 44 So. 2d 459, and Martin v. State, 217 Miss. 506, 64 So. 2d 629. These cases are not in point on the facts. In all four of the cited cases, the search was remote and not reasonably connected in point of time with the arrest.

In the case of Shay v. State, 229 Miss. 186, 90 So. 2d 209, the patrolman delivered Shay and his bag to the Sheriff of Warren County after having traveled from some point on Highway 61 north of Rolling Fork in Issaquena County. The search of the bag was not made until sometime after he had been brought to Warren County. See also Bartlett v. U. S., 232 F. 2d 135; State v. Green (Mo.), 292 S.W. 2d 283; White v. State (Ind.), 152 N.E. 2d 894; Richardson v. State (Okla.), 264 P. 2d 371.

After careful considering the various assignments, we are of the opinion that there is no reversible error.

AFFIRMED.

McGEHEE, C.J., AND KYLE, ETHRIDGE AND JONES, JJ., CONCUR.

CERTIFICATE

I, E. H. Cunningham, Jr., of Counsel for the Appellant herein, hereby certify that I have this day personally delivered a true and correct copy of the above and foregoing statement as to jurisdiction to Honorable Joe T. Patterson, Attorney General of the State of Mississippi, at his office at the State Capitol Building at Jackson, Mississippi.

Witness my signature this the 19th day of February, 1963.

E. H. Cunningham, Jr.

E. H. Cunningham, Jr.
Of Counsel for Appellant

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GEORGE FUQUA ..... Appellant

vs.

THE STATE OF MISSISSIPPI ..... Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE FUQUA — Appellant

vs.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR REHEARING

In compliance with Rule 58, the Appellant files this his Petition for a rehearing.

This Petition is based on substantial grounds available to Petitioner although not previously presented to this Court.

THE EVIDENCE OFFERED BY THE STATE DOES NOT RISE TO THE STANDARDS REQUIRED SO AS TO WARRANT A CONVICTION FOR VIOLATION OF THE SUBSTANTIVE LAWS.

At the conclusion of the State's case in chief, the defendant seasonably requested a peremptory instruction to find the defendant not guilty, which was, by the Court, overruled. This error was preserved and urged on the motion for a new trial and Appellant's brief filed in the Supreme Court of the State of Mississippi.

Under the provisions of Section 2044, Mississippi Code of 1942, entitled "Burglary — possession of burglar's

tools," the bare possession of such tools constitutes a violation regardless of the intent with which such tools are possessed. However, the tools, implements or instruments, must be peculiarly adapted to the commission of burglary, larceny or robbery in order to render the possession unlawful.

It is sufficient to charge this crime substantially in the language of the statute, but the proof must conform to the requirements of the statute in that the tools are "designed" for the purposes named in the statute by burglars and not merely that they may be used, their general use and purpose being lawful. *Satterfield v. State*, 174 Ark. 733, 296 S. W. 63.

The term "designed" as used in the statute defining the crime of possessing burglar's tools means more than mere common household articles or everyday work tools capable of use in breaking and entering. The tools must be "designed," that is, contrived or taken to be employed for such purpose. *People v. Dorrington*, 221 Mich. 571, 181 N. W. 831; *State v. Salernitano*, 27 N. J. Supp. 537, 9 A. 2d 820.

> "The burden rests on the state to prove the essential elements of the offense of possessing burglar's tools or implements, as that instruments found in defendant's possession were of the character denounced by the statute." 12 C. J. S. 755, Sec. 70.

Section 2044, Mississippi Code of 1942, does not contemplate possession of common every day work tools of mechanics, plumbers, carpenters, farmers or other persons who may require such tools and implements in their business, trade of profession. If so, the statute would be unconstitutional and void. The tools and implements prohibited and denounced by the statute are those which

are "peculiarly adapted" to aid in the commission of burglary, larceny or robbery. This statute is to be strictly construed or otherwise the possession of practically any tool or implement manufactured would come within the prohibition of the statute.

There are three (3) elementary but essention rules involved in this trial which should be remembered when considering this point of our argument. These rules are (1) presumption of innocence; (2) burden to prove guilt beyond all reasonable doubt; and (3) that such tools and implements are "peculiarly adapted and designed" for the purpose of burglary and larceny as alleged in the indictment. The word "robbery" was not included in the indictment, but only burglary and larceny.

The State offered only one witness in an attempt to establish the requirement that such tools and implements were peculiarly adapted or designed for aid in the commission of burglary or larceny. This witness was Patrolman Jack Anderson, of the Mississippi Highway Patrol. It was this same witness whose hostile attitude and prejudice against the defendant was so evident that the Court cautioned him (R.44), and defense counsel was amazed at the extent thereof (R.289-90).

There was no appreciable effort made by the State to show that any of the tools or items were designed or adapted for burglary or larceny. The record is devoid of any positive evidence in this regard. The substance of the State's case is the introduction thereof. No other witness testified differently in this regard.

Aside from the fact that each and every item introduced in evidence by the State was the ordinary mechanic's tool or household item which may be found in the possession of most garages, mechanics and homes, and

which may be found for sale at practically all hardware, variety and drug stores, with the exception of the 38 caliber pistols which are not recognized by any authorities as tools adapted and designed to aid in the commission of burglary or larceny, but are weapons.

There was no proof that this defendant had been involved in a burglary or larceny or in any other crime.

Under the statute it is the tool or implement itself that determines the legality, or illegality, thereof, and not he who possess it. The determination is as to the res, and not the individual.

The evidence introduced in this cause fell far short of the proof required in cases of this nature. In prosecutions for possession of burglar's tools PROOF MUST conform to requirements of statute in that tools are designed and adapted for unlawful purpose and not merely that they may be used where their general use and purpose may be lawful. *Satterfield v State*, 174 Ark. 733, 296 S. W. 63. The possession of tools in absence of any evidence warranting an inference that Petitioner possessed them for the purpose of committing burglary or larceny was insufficient to sustain a conviction of felonius possession of burglar's tools under statute since the tools in this case, as testimony shows, served a legitimate purpose and afforded no basis for an inference of possession for a criminal one. People v Barrington, 221 Mich 571, 181 N. W. 831.

CONCLUSION

Wherefore, it is respectfully submitted that your Petitioner has been deprived of his constitutional rights as guaranteed by the XIVth Amendment to the Constitution of the United States and that this Court should take

CERTIFICATE

I, E. H. Cunningham, Jr., of counsel for the Appellant, certify that I have this day personally delivered a true and correct copy of the above and foregoing Petition for rehearing to Honorable Joe T. Patterson, Attorney General of the State of Mississippi, at his office in the State Capitol Building at Jackson, Mississippi, and further certify that this Petition is presented in good faith and not for delay, and that this Petition is restricted to substantial grounds available to Petitioner although not presented previously.

Witness my signature this the ___ day of May, 1963.

E. H. Cunningham, Jr.
Of Counsel for Appellant